

**United States Department of Labor
Employees' Compensation Appeals Board**

C.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 12-746
Issued: May 1, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 10, 2011 appellant filed a timely appeal from an August 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$3,927.25 for the period May 17 to July 2, 2011; and (2) whether she was at fault in the creation of the overpayment, and thus, not entitled to waiver of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 1, 2008 appellant, then a 45-year-old clerk, filed an occupational disease claim for bilateral carpal tunnel syndrome as a result of nine years of keying, holding and boxing mail. OWCP accepted her claim for bilateral carpal tunnel syndrome. In its December 18, 2008 letter accepting the claim, it advised appellant that she was expected to return to work as soon as she was able and to notify OWCP once she returned to work. It further informed her that she was only entitled to compensation if she was unable to work due to her accepted condition and that she should immediately return any compensation checks received which included payment for a period during which she returned to work. Appellant received wage-loss compensation for disability.

On June 23, 2011 OWCP was informed that appellant returned to work full duty on May 17, 2011. Appellant continued to receive compensation by direct deposit of \$2,339.64 for the periods May 8 to June 4, 2011 and June 5 to July 2, 2011.

On July 21, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,927.25 because she returned to work on May 17, 2011 but received disability compensation until July 2, 2011. Appellant was found at fault in creating the overpayment, as she knew or should have known that she was not entitled to receive compensation for a period after her return to work. The overpayment worksheet stated that she was paid \$2,339.64 for the 28-day period June 5 to July 2, 2011 or \$83.558571 a day. Appellant received the same net amount \$2,339.64 for the 28-day period prior to June 5, 2011. OWCP multiplied the daily rate of \$83.558571 by 47, the number of days appellant worked, to total an overpayment of \$3,927.25. OWCP informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing on the issues of fault and a possible waiver.

Appellant requested that OWCP make a decision based on the written evidence. She submitted an overpayment recovery questionnaire, which reported a monthly income of \$2,100.00 and indicated that she had two dependants. Appellant reported \$10.00 cash on hand, \$45.00 in her checking account and a savings account balance of \$100.22, totaling \$155.22. She listed monthly expenses as \$650.00 for rent, \$300.00 for food, \$200.00 for clothing, \$765.00 for utilities, \$475.00 for car payments, \$60.00 for personal expenses, \$89.00 for a credit union loan, and \$200.00 for a Texas car title loan, totaling \$2,739.00. Appellant contended that she was not at fault in the overpayment because she did not get a payment for six to seven weeks after she was on workers' compensation and she submitted all the necessary paperwork before she returned to work. She submitted earnings and leave statements indicating that she received \$1,488.47 every pay period and various statements and receipts.²

² Appellant provided a receipt of \$48.00 for gas and indicated that she filled up on gas four times a month. She also submitted a monthly payment slip of \$30.78 and \$122.15 for a Gerber Life Insurance policy and utility payments of \$26.34 for gas, \$437.67 for electricity, and \$98.77 for water and sewage. Appellant also had a statement from Neches Federal Credit Union indicating she had a balance of \$166.91 and had taken out a new loan for \$500.00.

In an August 29, 2011 memorandum of an August 26, 2011 telephone conference, appellant was advised to submit further income evidence, copies of her actual bills and a lease for her rent. She contended that she should be granted a waiver because it was not her fault that the employing establishment did not notify OWCP immediately when she returned to work. Appellant also stated that her hours were going to be cut since other postal offices around her area were closing. When asked if she could pay \$50.00 a month, she replied that she could but it would create a hardship.

In a decision dated August 29, 2011, OWCP finalized the overpayment of \$3,927.25. It found that appellant was at fault in the creation of the overpayment because she accepted payments which she knew or reasonably should have known to be incorrect. OWCP pointed out that during the August 26, 2011 conference call she agreed to pay \$50.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ OWCP's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$3,927.25. The record reflects that she returned to work full duty on May 17, 2011 at her regular salary. As noted, FECA and OWCP regulations provide that a claimant may not receive wage-loss compensation while simultaneously receiving salary or other type of pay from the United States.⁶ Computer printouts and overpayment worksheets of record establish that appellant received compensation in the amount of \$3,927.25 for the period May 17 to July 2, 2011 even though she returned to work on May 17, 2011. This resulted in an overpayment of \$3,927.25. Appellant received \$2,339.64 every 28 days, during the relevant period, which when divided by 28, resulted in a daily rate of \$83.558571. This daily rate was multiplied by 47 days, to determine the \$3,927.25 amount of overpayment. The Board will affirm the fact and amount of overpayment in compensation of \$3,927.25.

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ 5 U.S.C. § 8116(a).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁷ No waiver of payment is possible if appellant is not without fault in helping to create the overpayment.⁸

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.⁹

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The

⁷ *Id.* at § 8129(b).

⁸ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁹ 20 C.F.R. § 10.433(a).

degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.¹⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. In cases where a claimant receives compensation through direct deposit, however, OWCP must establish that at the time a claimant received the direct deposit in question she knew or should have known that the payment was incorrect.¹¹ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault the first time an incorrect payment is deposited into her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹² OWCP's regulations, effective August 29, 2011, place claimants on notice that good faith and exercise of a high degree of care in regard to receipt of benefits require review of electronic bank statements. This regulation does not diminish the effect of the Board's previous decisions, as in *Tammy Craven*,¹³ that the deposit of compensation into appellant's bank account marks the moment that claimant gains control of the funds from the U.S. Treasury and the overpayment was created. As explained in *Craven*, because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that a claimant may not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. In this case, appellant received two payments electronically for periods ending

¹⁰ *Id.* 20 C.F.R. § 10.433(a) (August 29, 2011) provides as follows:

(a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits. Such care includes reporting events which may affect entitlement to or the amount of benefits, including reviewing their accounts and related statements (including electronic statements and records from their financial institutions involving EFT payments). A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which the recipient knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

¹¹ *J.H.*, Docket No. 11-114 (issued July 18, 2011); *R.C.*, Docket No. 10-2113 (issued July 6, 2011); *C.S.*, Docket No. 10-926 (issued March 16, 2011).

¹² *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹³ *Id.*

June 4 and July 2, 2011. Although appellant accepted the overpayment in this case by gaining control of the funds deposited into her account, OWCP has not shown that she knew or should have known at the time of the first electronic deposit of June 4, 2011 that the payment was incorrect. It has not presented sufficient evidence to establish that she accepted a payment which she knew or should have known to be incorrect. The Board finds that OWCP improperly determined that appellant was at fault in the creation of the June 4, 2011 overpayment. The Board will set aside OWCP's August 29, 2011 decision on the issues of fault and recovery with respect to the first June 4, 2011 electronic payment and remand the case for consideration of waiver based on appellant's current financial circumstances.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$3,927.25 for the period May 17 to July 2, 2011 because she received wage-loss compensation after she returned to work at her regular salary on May 17, 2011. The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the first June 4, 2011 electronic payment and will remand the case for consideration of whether waiver of the recovery of the overpayment is warranted.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded for further action consistent with this decision.

Issued: May 1, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board